

Agreement WM-GM-087
Quarterly Report
April 5, 2006

Report Period

Pursuant to the agreement, this report covers the activities of the Clark Fork Task Force for initial period of January through March 2006.

Task Force Activities

During this period, the Task Force met twice, on January 25, and March 6, 2006. I arranged, facilitated, and summarized each of these meetings. The summaries are attached below in Appendix 1. I also made contacts with Dr. Tom Patton at the Montana Bureau of Mines and Geology and Dr. Bill Woessner to discuss and plan for the ground water technical conference discussed below and in the meeting summaries and with Mary Sexton and Hal Harper concerning the Hungry Horse water negotiations. The state is attempting to proceed with the Confederated Salish and Kootenai Tribes in seeking negotiations with the Bureau of Reclamation (BOR) regarding an allocation of Hungry Horse water. The Tribes, however, have not yet responded to this request, so no activity is underway to initiate the negotiation process. Finally, I prepared and circulated to the Task Force summaries of both the technical and policy ground water conferences.

January 25, 2006

At this meeting the Task Force focused on two major topics: determining whether the BOR has the computer modeling capability to both plan, schedule and manage water deliveries from Hungry Horse Dam to meet the needs of Clark Fork Basin water users and continued planning for the ground water technical conference. BOR personnel presented a modeling system at the meeting that could be used for both the planning and management function. Also at the meeting, the Task Force agreed on the ground water conference focus, orientation, technical subject matter, target audience, and the preparation of a ground water primer for conference participants.

March 6, 2006

The Task Force heard presentations from the Montana members of the Northwest Power and Conservation Council (NPCC) about recent Washington legislation and federal litigation that may affect the flows from Hungry Horse and from Mike McLane about the DNRC Ground Water-Surface Water Working Group (Working Group). As a result of these presentations, the Task Force decided to invite Jack Stults to its next meeting to discuss quantity planning by the four Columbia River states and to consider taking a position on the recommendations of the Working Group. The Task Force also refined its ideas for the second ground water conference that would focus on policy by identifying a issue list and list of those targeted to attend the conference.

MEMORANDUM

TO: Members, Clark Fork Basin Water Management Task Force (Task Force)
FROM: Gerald Mueller
SUBJECT: Summary of the January 25, 2006 Task Force Meeting
DATE: January 28, 2006

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Harvey Hackett	Bitterroot Water Forum
Bill Slack	Flathead Joint Board of Control
Fred Lurie	Blackfoot Challenge
Jim Dinsmore	Upper Clark Fork
Matt Clifford	Clark Fork Coalition
Arvid "Butch" Hiller	Mountain Water Company
Elan Darrow	Flathead Basin Commission
Jay Stuckey	Green Mountain Conservation District
Gail Patton	Sanders County
Holly Franz	PPL Montana
Marc M. Spratt	Flathead Conservation District/Flathead Chamber of Commerce
Rep. Verdell Jackson	House District 6

Staff:

Gerald Mueller	Consensus Associates
Mike McLane	Montana Department of Natural Resources and Conservation (DNRC)

Other:

Rich Moy	DNRC
Larry Dolan	DNRC
Bill Schenk	Montana Department of Fish, Wildlife & Parks
Phil Tourangeau	CS&KT
Rhonda Swaney	CS&KT
John Kilpatrick	United States Geological Service (USGS)
John Roache	United States Bureau of Reclamation (BOR)
Warren Sharp	BOR

Meeting Agenda

- Task Force membership
- BOR Clark Fork River model
- CS&KT legal staff meeting
- Hungry Horse negotiations next steps
- Possible DNRC funding
- Ground water conference discussion
- Water Rights Adjudication Update
- Review work plan
- Public Comment
- Schedule meeting

Task Force Membership

Gerald Mueller reported that he had met yesterday with DNRC Director Mary Sexton and discussed Task Force membership. Ms. Sexton stated that she thought her letter of November 8, 2005 confirmed the Task Force membership. In that letter she specifically approved adding Arvid Hiller and James Steele, Jr. to the Task Force. Mr. Mueller asked her to send a letter including an official list of Task Force members, and she agreed to do so. The Task Force discussed whether to add members of Resource Conservation and Development Councils (RC&Ds) to represent business and economic development interests. The executive directors of these organizations are employees of the Natural Resources Conservation Service, a federal agency. Task Force members agreed that its members should be or represent water users and not agency representatives. However, the executive directors of one or both of the Clark Fork River basin RC&Ds, the Northwest Regional RC&D and Headwaters RC&D could serve as *ex officio* members. The Flathead Lakers, an organization of homeowners and others with interest in Flathead Lake, and the Flathead Chamber of Commerce are other possible groups to consider for Task Force membership. Mike McLane agreed to try to identify possible business/economic development interests who might want representation on the Task Force.

BOR Clark Fork River Model

System Overview - Warren Sharp from the BOR Yakima office provided an overview of a system of models used by the BOR in modeling rivers. The first component of the system is the Precipitation Runoff Modeling System (PRMS). PRMS calculates basin runoff from temperature and precipitation data. The unregulated flows from PRMS are then input into Riverware, a model which incorporates a series of rules for movement of water, such as storage operation, water rights, and minimum required instream flows. Riverware can operate in hourly, daily, weekly, or yearly time step. This model can be used in a planning mode to assess impacts of different operational constraints and an operational mode to schedule water management activities. For the Yakima basin in which anadromous salmon and steelhead are a critical consideration, the regulated flows produced by Riverware are input into the River Analysis model. This model incorporates physical channel information and the regulated flows from Riverware to calculate water depth and velocity, wetted perimeter, and water surface width. This information is then input into the Ecosystem, Diagnostic, and Treatment (EDT) model which calculates numbers of fish. For the Yakima River, EDT is operated by a committee of biologists, including representatives of federal and state fishery agencies and irrigation districts.

Question - Has this system of models been subjected to peer review?

Answer - It has been reviewed within the BOR. In the Yakima, we also have a technical committee including representatives of the various stakeholders to build and review the models.

Question - Can Riverware incorporate water rights?

Answer - Yes, by using a table of water right specified diversions at specified locations, the model can distribute water pursuant to water rights. Other models such as MODSYM and MODFLOW are also used to address water rights. The latter models are used for the Snake River basin.

Question - Does documentation exist for this system of models?

Answer - Not yet, but documentation is under development and should be completed in 2007.

Question - Why did the BOR choose these particular models rather than existing commercially available models?

Answer - The BOR made the decision to develop this system and not use proprietary commercial models for reasons of cost and model accessibility. We do not have to pay a fee for each model run and wait for the model owner to make runs for us. We operate the model ourselves.

Question - Has this modeling system been used in lawsuits?

Answer - Not that I am aware.

Question - In what river basins has this modeling system been used?

Answer - The BOR has used it for the Colorado, Rio Grande, Truckee-Carson, Umatilla, and Methow Rivers. The PRMS and Riverware models are being developed for the South Fork of the Flathead to manage Hungry Horse releases.

PRMS - John Kilpatrick, from the Helena USGS office, used a Power Point presentation to describe in more detail how the PRMS works. Mr. Kilpatrick is currently adapting this model for the South Fork of the Flathead River. A copy of his presentation is attached as Appendix 1.

Riverware - John Roache described how he uses the Riverware software to plan and schedule water releases from Hungry Horse.

Question - Has your use of this model been documented?

Answer - No.

Question - Could Riverware be used to plan and assess the impacts of water released pursuant to a contract for water stored in Hungry Horse, and could it also be used to walk water down the Clark Fork to delivery to specific points?

Answer - Yes.

Comment - Because the Tribal water rights are unspecified, these models could not be used to forecast water use accurately.

Response - The purpose of the models is not to predict water use but to assess the effects of particular constraints and/or to schedule water use activities such as releases from Hungry Horse.

CS&KT Legal Staff Meeting

Gerald Mueller reported on the meeting that he and Marc Spratt on December 1, 2005 with members of the Confederated Salish and Kootenai Tribal Legal Department. Tribal officials attending the meeting included John Carter, Rhonda Swaney, Dan Decker, Jr., and Phil Tourangeau. Mr. Mueller reviewed his December 1, 2005 memo reporting on the meeting. The memo is attached below as Appendix 2 below.

Hungry Horse Negotiations Next Steps

The Task Force agreed to three next steps. First, we will encourage the state to seek an answer to Ms. Sexton's November 4, 2005 letter to then Tribal Chairman Fred Matt suggesting that the Governor and the Tribes jointly approach the BOR to ask how much water it could make available out of storage at Hungry Horse Reservoir. Second, we will request that the state, independent to the Tribe's response to Ms. Sexton's letter, begin discussions with the BOR about the process for determining how much Hungry Horse water state water users need and how much of it may be available for a contract with the state. Finally, Rich Moy agreed that the DNRC will develop scenarios of future basin water use that might be used in an analysis of a contract for Hungry Horse water.

Possible DNRC Funding

Rich Moy stated that Mary Sexton has identified a source of funding for four large basin groups working in the Clark Fork, Flathead, the Missouri, and Yellowstone basins, respectively. The Clark Fork Task Force might be in line for \$20,000. Ms. Sexton is also interested in convening a Clark Fork Basin roundtable with all of the basin's watershed groups, probably during this spring.

Ground Water Conference Discussion

At its November meeting, the Task Force decided to convene a steering committee to assist with designing a ground water conference and exploring potential convening partners. A steering committee was formed. Its members were: Bob Davis, USGS; John LaFave and Tom Patton, Bureau of Mines and Geology; Mike McLane, DNRC; Joe Meek, Montana Department of Environmental Quality; Gretchen Rupp, Montana Water Center; Marc Spratt, Task Force; Bill Woessner, Riverine Center; and Gerald Mueller, Task Force Facilitator. A conference call with this group was held on December 7, 2005. Mr. Meek was unable to participate in the call. A summary of this call is attached as Appendix 3.

One of the next steps resulting from this call was a request to the Bureau of Mines and Geology that they prepare a background paper for the conference participants. The Bureau agreed to provide a cost estimate for preparing this paper if the following questions were answered:

- What is the conference focus?
- Will it be technical or policy oriented?
- If it is technical, what areas will be addressed?
- Who is the target audience?
- What is the appropriate background information for the attendees?

The Task Force discussed these questions and answered them as follows:

- Conference Focus - The Task Force's long-term goal concerning ground water and surface water is an interactive management model for each sub-basin and eventually the basin as a whole. The focus for the conference is answering three questions: What do we know about the Basin's ground water and its interaction with surface water? What do we need to know? How do we acquire that information? The Task Force's long-term goal concerning ground water and surface water is an interactive management model for each sub-basin and eventually the basin as a whole.
- Technical or Policy Orientation - The first conference should be technical. A separate follow-on conference would target policy issues.
- Technical Areas to Address - Identifying sources for each aquifer and quantifying ground water resource.
- Target Audience - Agency and private sector hydrologists, university scientists, well drillers, invited policy makers and funders, and invited planners.
- Conference Participant Background Information - A Clark Fork Basin ground water primer written in lay person language.

Water Rights Adjudication Update

Mike McLane provided an update about DNRC's adjudication activities. Using the water right centralized record data base of water right names and addresses, bills for the adjudication fee mandated by the last legislature have been mailed. About 20,000 pieces of this mailing were returned as non-deliverable due to incorrect names, addresses, deaths, etc. About 50% of the total of the fees have been paid. DNRC called back 25 retired and other former employees to answer the telephones in response to the fee mailing. These people are answering the telephone 12 hours a day, six days a week. DNRC has also established an appeals process for the bills. Some people have contacted the DNRC because they have not received a bill. One positive outcome of this process is correcting the centralized data base. Some water users who made larger volumetric water rights claims have decided to drop their claims rather than pay the required fee, probably because they do not intend to use their claim, or it was inflated about actual historic use. The staff handling the fees are separate from those examining claims. The claims examination is ahead of schedule.

Question - What happens to people who do not file an appeal and do not pay their fee?

Answer - Penalties begin to accrue after the fee due date. Unpaid bills encumber property sales. A lien is placed on the water right.

Work Plan

The Task Force reviewed and made no changes to its work plan.

Public Comment

There was no additional comment.

Next Meeting

The next meeting was scheduled for March 6, 2006, and future meetings will return to the first Monday of each month. The agenda topics will include: the Hungry Horse negotiations, the ground water technical and policy conferences, the Clark Fork Basin Roundtable, and a report on the DNRC Ground Water-Surface Water Task Force.

Appendix 2
Clark Fork River Basin Task Force
C/O Gerald Mueller
440 Evans
Missoula, MT 59801
(406)543-0026

MEMORANDUM

Date: December 1, 2005
To: Clark Fork Task Force
From: Gerald Mueller
RE: Tribal Meeting

Marc Spratt and I met this morning with several members of the Confederated Salish and Kootenai Tribal Legal Department. The attendees included John Carter, Rhonda Swaney, Dan Decker, Jr., and Phil Tourangeau. Generally, I believe the meeting was productive.

I ran through paper copies of a series of Power Point slides explaining the genesis of the Task Force's Hungry Horse recommendation, how it might be implemented and what it might mean for Tribal water rights. The content of the slides is included below as Appendix 1.

I highlighted the State of Washington's quest for additional water withdrawal from the Columbia and the information provided us at the last meeting by the Northwest Power and Conservation Council's Kerry Berg about the implications of the plaintive's request before Judge Redden for more water for salmon and steelhead. I also expressed my view that if a collision occurs between state water rights and the federal government's authority to operate its dams and reservoirs, that federal preemption would be likely.

Both John and Rhonda asked about the relationship of contracts for Hungry Horse stored water with senior water rights. I explained my nonlegal view that senior rights holders have the right to make a call to prevent water from being stored but that once the water is stored that the Bureau, pursuant to its water right, can contract for the release of the storage.

After the presentation and discussion, John Carter stated, that while he was not speaking for the Tribes, that so long as the state acknowledges that contracts for stored water could not affect allocations of water based on priority dates and that the Tribes' water rights are senior, that approaching the Bureau of Reclamation to get "a place in line" for Hungry Horse water might be acceptable.

Appendix 3

December 7, 2005

Conference Call Summary

Participants

Bob Davis, USGS
John LaFave & Tom Patton, Bureau of Mines and Geology
Mike McLane, DNRC
Gretchen Rupp, Montana Water Center
Marc Spratt, Clark Fork Basin Task Force (Task Force)
Bill Woessner, Riverine Center
Gerald Mueller, Task Force Facilitator

Call Subject

Discuss the Task Force idea of convening a technical conference about Clark Fork River basin ground water and its interaction with surface water.

Discussion

The following ideas, suggestions, and comments were offered by the call participants;

- In order to answer the Task Force's three questions (what do we know about the basin ground water, what do we need to know, and how to get the needed information), the Task Force needs to identify the purpose for answering them. In other words, what management issues/questions is the Task Force trying to address?
- An appropriate framing question might be, how can we sustain water development in the Clark Fork basin while maintaining the ecological function of its streams and meeting instream and downstream water uses?
- A second framing question might be, how far do we carry science into policy determinations?
- Another possible conference topic might be how other states such as Colorado and Idaho are approaching quantifying, monitoring, and regulating ground water and ground water-surface water interactions.
- The conference might also critique the ground water characterization program to assure that the appropriate types and amount of data is being developed.
- The Water Center and the MSU Wheeler Center are planning a conference on water policy and law on September 18-20 in Bozeman.
- The UM Riverine Center is planning its annual conference for September 21-22.

Next Steps

- Identify Task Force basin water management questions necessary to frame the conference. (*Gerald Mueller*)
- Explore funding for a white paper providing background information for conference participants about the ground water in each of the five subbasins of the Clark Fork, i.e. upper Clark Fork, Blackfoot, Bitterroot, Flathead, and lower Clark Fork. (*Gerald Mueller*)
- Propose a way to input information about other related state activities into the conference. (*Mike McLane*)
- Visit with the Montana Chapter of the Montana Water Resources Association about adding a technical session on the Clark Fork basin ground water to its October 2006 conference in Polson. (*Mike McLane & Gerald Mueller*)
- Find out information about a November conference that Governor Schweitzer may convene about watersheds and economic development. (*Mike McLane*)
- Discuss how the Water Center and the Riverine Center might work together on a water policy conference in late September 2006. (*Bill Woessner & Gretchen Rupp*)
- Reconvene this steering committee in early January 2006. (*Mike McLane & Gerald Mueller*)

MEMORANDUM

TO: Members, Clark Fork Basin Water Management Task Force (Task Force)
FROM: Gerald Mueller
SUBJECT: Summary of the March 9, 2006 Task Force Meeting
DATE: March 12, 2006

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Marc M. Spratt	Flathead Conservation District/Flathead Chamber of Commerce
Holly Franz	PPL Montana
Gail Patton	Sanders County
Elna Darrow	Flathead Basin Commission
Matt Clifford	Clark Fork Coalition
Fred Lurie	Blackfoot Challenge
Bill Slack	Flathead Joint Board of Control
Harvey Hackett	Bitterroot Water Forum

Staff:

Gerald Mueller	Consensus Associates
Mike McLane	Montana Department of Natural Resources and Conservation (DNRC)

Other:

Phil Tourangeau	Confederated Salish and Kootenai Tribes
Bruce Measure	Montana Member, Northwest Power and Conservation Council
Rhonda Whiting	Montana Member, Northwest Power and Conservation Council

Meeting Agenda

- Task Force membership
- Northwest Power and Conservation Council Presentation
- Discussions with Hal Harper and Mary Sexton
- DNRC Ground Water-Surface Water Working Group
- Ground water conference discussion
- Review work plan
- Public comment
- Next meeting

Task Force Membership

One change has occurred in the Task Force membership. Steve Fry will no longer represent Avista; instead, Nate Hall, who works out of Avista's Noxon Resource Office, will represent Avista. Mike McLane stated that DNRC Director Mary Sexton has not yet signed the letter officially designating the Task Force members.

Northwest Power and Conservation Council Presentation

Bruce Measure and Rhonda Whiting, Montana's two members to the Northwest Power and Conservation Council (NWPCC) discussed two topics: legislation recently passed by the Washington legislature and signed into law by Governor Gregoire, and the federal lawsuit challenging the salmon and steelhead biological opinion.

Washington Legislation - This legislation was signed into law on February 16, 2006. A copy of the legislation is included below as Appendix 1. Its purpose is to develop new water supplies in the Columbia basin for both consumptive and instream uses. The development is to occur through new storage, conservation, and "...any other actions designed to provide access to new water supplies within the Columbia river basin for both instream and out-of-stream uses." It is possible that this additional water development in Washington may come at the expense of Montana water uses provided by Hungry Horse and Libby Dams. Previous Montana NWPCC members have sought to reduce the operational impacts on Hungry Horse and Libby by limiting their draw down through September and reducing their fluctuations to generate peak power. In 2003, the NWPCC adopted "Mainstem Amendments" which included the following provisions regarding Hungry Horse and Libby:

Spring and summer operations at Libby and Hungry Horse dams

- Continue to implement the VARQ flood control operations and implement Integrated Rule Curve operations as recommended by Montana Fish, Wildlife & Parks.
- With regard to operations to benefit Kootenai River white sturgeon, the Council recommends a refinement to operations in the biological opinion that specify a "tiered" strategy for flow augmentation from Libby Dam to simulate a natural spring freshet.
- Refill should be a high priority for spring operations so that the reservoirs have the maximum amount of water available during the summer.
- Implement an experiment to evaluate the following interim summer operation:
- Summer drafting limits at Libby and Hungry Horse should be 10 feet from full pool by the end of September in all years except during droughts when the draft could be increased to 20 feet.

These amendments are designed to protect Montana's bull trout, cutthroat trout, and white sturgeon. Unfortunately, these amendments have not been implemented. Mr. Measure and Ms. Whiting will continue to monitor development of this legislation and encourage this group to explore the implications of this legislation to our interests and to report our conclusions back so that Montana's interests can present a united front in the opposition to any perceived detriment to the state or its' citizens.

Litigation - The state of Montana originally filed amicus brief in the litigation against the Endangered Species biological opinion addressing Columbia River salmon and steelhead stocks. Subsequently, Idaho, Montana and Washington joined the lawsuit as defendants, Oregon intervened as a Plaintiff. Judge Redden, who is hearing the case, has issued a one year stay in the proceedings to allow the parties to seek an agreement. Montana's NWPCC members report significant progress from the weekly meetings by the coalition of upriver interests and the Bonneville Customer Group, but a great deal of unproductive posturing and sidetracking by the Plaintiff's representatives. The Montana NWPCC members formed the coalition to advocate for upstream interests, including the mainstem amendments. The coalition includes: the states of Montana and Washington; the Kootenai of Idaho, Colville and Spokane Tribes; and the BPA customer group. The coalition has met and continues to meet to develop positions in the litigation. The coalition originally included only sovereigns, i.e., states and tribes, but recently has included others if they agree that the discussions at the meetings cannot be used against the participants in legal proceedings. Judge Redden appears receptive to some coalition positions.

Discussions with Hal Harper and Mary Sexton

Gerald Mueller reported that after the last meeting, he met with Hal Harper, Governor Schweitzer's chief policy aid, to convey the Task Force's concerns about beginning activity that would lead to the negotiations called for in HJR3, passed by the last legislature. Mr. Harper stated that he had had one conversation with Mr. Steele about the Hungry Horse initiative, and

that Chairman Steele is approaching water right related issues cautiously. He agreed that it would be a good idea to contact Mr. Steele about the state's interest in talking with the Bureau about the process necessary for determining how much Hungry Horse water state water users need and how much of it may be available for a contract with the state. Mr. Harper said he would visit with Chairman Steele.

Mike McLane reported that DNRC Director Mary Sexton has said that a meeting between the state and the Tribes will be scheduled for late March or early April. The Hungry Horse initiative will be discussed at that meeting. Ms. Sexton, Hal Harper, and the Montana NWPCC members will participate on behalf of the state. Mr. McLane also indicated that the Clark Fork Roundtable discussed at the last Task Force meeting has not yet been scheduled. Depending on the outcome of this Roundtable, additional funding may be available to the Task Force.

DNRC Ground Water-Surface Water Working Group

Mike McLane showed a Power Point presentation explaining the background concerning the Working Group, which Mary Sexton created and he is facilitating. He also shared the Working Group's recommendations for statutory changes that will be presented to the Legislative Environmental Policy Committee (EQC). The recommendations are included below in Appendix 2. The Task Force agreed to review the recommendations prior to its next meeting in April and to consider taking a position on them at that meeting.

Ground Water Conference Discussion

Technical Conference - Mr. Mueller reported that he has attempted to contact University of Montana Geology Professors Woessner and Moore to see if plans are underway for including the Task Force conference as an extra day on the Riverene Center Conference this coming fall. He did have a conversation with Professor Moore who thought that the Riverene Center planned to incorporate an extra day for the Task Force ground water topics, but that Professor Woessner should be contacted to confirm this. Mr. Mueller stated that because Professor Woessner is traveling, this contact remains to be made. Mr. Mueller also said that he had answered questions that Tom Patton and John LaFave had posed regarding the Bureau of Mines and Geology's preparation of the pre-conference white paper discussed at the last Task Force meeting. Mr. Mueller asked Mr. Patton and LaFave to prepare a cost estimate for preparing the paper, but he has not had a response yet. He will call Mr. Patton prior to the next meeting.

Policy Conference - The Task Force discussed the target audience and issues that might be addressed in a separate policy conference that would follow the technical conference. The list of interests to target and of the issues follows:

Target List

- Elected local and tribal government officials
- Local government planners
- Legislators/candidates
- Task Force member constituencies
- Irrigation districts

Issue List

- Present and projected use of water
- The implications of converting agricultural lands to non-agriculture uses such as subdivisions on water management and use
- The recommendations of the DNRC Surface /Ground Water Working Group
- Water demands and uses in downstream states

- Re-use of waste water

Mr. Mueller agreed to produce and circulate to the Task Force prior to its next meeting a one page summary of the policy conference ideas.

Work Plan

Two additional topics were suggested for Task Force deliberations: the water compact between the state and the United States Forest Service (USFS), and a possible inter- state organization to consider water allocations among the four Columbia basin states, i.e. Montana, Idaho, Oregon, and Washington.

Public Comment

There was no additional comment.

Next Meeting

The next meeting scheduled for Tuesday, April 4, 2006. The agenda topics will include: the Hungry Horse negotiations, the ground water technical and policy conferences, the USFS compact, the inter-state water allocation body, and the Surface/Ground Water Working Group recommendations. A representative of the Compact Commission and the USFS will be invited for the USFS Compact. Jack Stultz, DNRC Water Resources Division Administrator, will be invited to discuss existing four state water quantity deliberations.

Appendix 1

See document attached in Adobe format.

Appendix 2

Surface Water / Ground Water Work Group **Recommend for Statutory Change**

Augmentation, Ground Water Analysis & Basin Closure Amendments

March 3, 2006

85-2-102 New Definition: “Augmentation Plan” means an arrangement, either temporary or permanent, to make water available for a new beneficial use in a water source or tributary through the development of a new or alternative water supply that reasonably prevents depletions to surface water where required or adverse effect to any water rights, or both.

New Section: "Municipality" means any incorporated city or town in the state organized and incorporated under Title 7 chapter 2 Montana Code Annotated.

New Section: “Stock water” means the use of water to provide drinking water for livestock which includes, but is not limited to, cattle, sheep, swine, goats, horses, mules, asses, llamas, alpacas, bison, ostriches, rheas, emus, and domestic ungulates.

85-2-102. (Temporary) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

- (1) "Appropriate" means:
 - (a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;
 - (b) in the case of a public agency, to reserve water in accordance with 85-2-316;
 - (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436; or
 - (d) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408.
- (2) "Beneficial use", unless otherwise provided, means:
 - (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;
 - (b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;
 - (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436; or
 - (d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408.
- (e) a use of water for augmentation.

85-2-329. Definitions. Unless the context requires otherwise, in 85-2-330 and this section, the following definitions apply:

- (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.
- ~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly~~

~~connected to surface water.~~

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Teton River basin" means the drainage area of the Teton River and its tributaries above the confluence of the Teton and Marias Rivers.

85-2-330. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the Teton River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal~~ municipalities or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) emergency temporary appropriations as provided for in 85-2-113 (3) .

(f) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, e and f.

85-2-335. Definitions. Unless the context requires otherwise, in 85-2-335 through 85-2-338, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

(2) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its tributaries above Milltown dam.

85-2-336. Basin closure -- exception. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water within the Upper Clark Fork River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application filed prior to January 1, 2000, for a permit to appropriate surface water to conduct response actions or remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not be used for dilution and must be limited to

a term not to exceed the necessary time to complete the response or remedial action, and the permit may not be transferred to any person for any purpose other than the designated response or remedial action.

(c) an application for a permit to appropriate surface water to conduct aquatic resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376). A permit issued to conduct mitigation actions may not be used for dilution.

(e d) an application for a permit to appropriate surface water for stock use;

(d e) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e f) an application for power generation at existing hydroelectric dams. The department may not approve a permit for power generation if approval results in additional consumption of water.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, d, and f.

(3) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water reservation application does not provide standing to object under 85-2-402.

(4) The department may not process or approve applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316.

85-2-337. Ground water permit applications -- report required. (1) During the period of basin closure provided in 85-2-330, 85-2-336(1), 85-2-340, 85-2-342, 85-2-344, or any administratively closed basin pursuant to 85-2-319, an applicant for a ground water permit in ~~the Upper Clark Fork River a closed~~ basin shall submit a report prepared by a ~~professional engineer or hydrologist~~ person educated and experienced in ground water science, addressing that analyzes the hydrologic hydraulic connection between the source of the ground water and surface water and that quantifies depletions to surface water that result from the proposed appropriation. If the applicant fails to submit the report required in this section, the application is considered defective and must be processed pursuant to 85-2-301.

~~(2) Except as provided in subsection (3), the department may not issue a permit to appropriate ground water in the Upper Clark Fork River basin unless the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the source of the ground water is not a part of or substantially or directly connected to surface water.~~

~~(3 2)~~ The department may issue a permit to appropriate ground water if the application includes an augmentation plan and if the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the augmentation plan provides for sufficient augmentation water in amount, time, and location to ~~replace~~ reasonably prevent depletions to surface water senior water rights.

(3) Where an augmentation plan requires an "Application for Change of Appropriation Right" under 85-2-402, that change application will be submitted with the "Application for Beneficial Water Use Permit" and its attached hydrologic report and augmentation plan. These applications will be evaluated in a combined proceeding.

85-2-339. Terminated. Sec. 6, Ch. 281, L. 1999.

85-2-340. Definitions. Unless the context requires otherwise, in 85-2-341 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a~~

~~stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

(3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above the confluence of the Jefferson and Missouri Rivers.

(4) "Madison River basin" means the drainage area of the Madison River and its tributaries above the confluence of the Madison and Jefferson Rivers.

(5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

85-2-341. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a state water reservation to reserve water within the Jefferson River basin or Madison River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal,~~ municipalities or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) temporary emergency appropriations as provided for in 85-2-113(3).

(f) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, e, and f.

85-2-342. Definitions. Unless the context requires otherwise, in 85-2-343 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony dam.

85-2-343. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a

permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have been issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal~~ municipalities or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more;

(e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage; or

(f) temporary emergency appropriations as provided for in 85-2-113 (3).

(g) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, d, e, f, and g.

85-2-344. Bitterroot River subbasin temporary closure -- definitions -- exceptions. (1) Unless the context requires otherwise, in this section, the following definitions apply:

(a) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(b) "Bitterroot River basin" means the drainage area of the Bitterroot River and its tributaries above the confluence of the Bitterroot River and Clark Fork of the Columbia River and designated as "Basin 76H".

(c) "Bitterroot River subbasin" means one of the following hydrologically related portions of the Bitterroot River basin:

(i) the mainstem subbasin, designated as "Subbasin 76HA";

(ii) the north end subbasin, designated as "Subbasin 76HB";

(iii) the east side subbasin, designated as "Subbasin 76HC";

(iv) the southeast subbasin, designated as "Subbasin 76HD";

(v) the south end subbasin, designated as "Subbasin 76HE";

(vi) the southwest subbasin, designated as "Subbasin 76HF";

(vii) the west central subbasin, designated as "Subbasin 76HG"; or

(viii) the northwest subbasin, designated as "Subbasin 76HH".

(2) As provided in 85-2-319, the department may not process or grant an application for a permit to appropriate water or for a state water reservation within a Bitterroot River subbasin until the closure for the basin is terminated pursuant to subsection (3) of this section, except for:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a ~~municipal~~ a municipality's

water supply;

(c) temporary emergency appropriations pursuant to 85-2-113 (3); or

(d) an application to store water during high spring flow in an impoundment with a capacity of 50 acre-feet or more.

(e) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) Each Bitterroot River subbasin is closed to new appropriations and new state water reservations until 2 years after all water rights in the subbasin arising under the laws of the state are subject to an enforceable and administrable decree as provided in 85-2-406 (4).

(5) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, and e.